Supreme Court, U.S.
FILED

931858 APR 28 1994

OFFICE OF THE CLERK

Case Number _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

KEN BREWER,

Petitioner

vs

WERNER ROGERS, individually,
GILLETT COMMUNICATIONS OF ATLANTA, Inc.
d/b/a WAGA, and JAMES RYAN SHULER,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

PETITION FOR WRIT OF CERTIORARI

DEEDRA M. BREWER
ATTORNEY FOR PETITIONER

BREWER & ASSOCIATES
231 MAXHAM ROAD, SUITE 120
AUSTELL, GEORGIA 30001
(404) 944-6267

78 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the existing constitutional malice standard of "reckless disregard" has become an impossible standard to meet, given that the media has no liability for failing to investigate and will therefore, as a practical matter, never investigate, even with the intent and knowledge that the broadcast would destroy a career due to allegations of criminal conduct and moral turpitude, leaving the plaintiff no remedy at law.

2. What is the distinction between a public figure and a limited purpose public figure when a local winning high school football coach is thrust into a controversy, the subject of the broadcast being personal and not related to the subject of the public controversy, and what standard of malice should be applied in determining whether the defendants acted with reckless disregard in publishing a defamatory telecast based only on fifteen year old sources.

3. Whether the lower court erred in failing to apply the "reckless disregard" standard as set forth in *Barber v Perdue,* 194 Ga App 287, 390 SE2d 234 (1089), *Curtis Publishing Company v Butts,* 388 U.S. 130, 87 S.Ct. 29 (1975), *Gertz v Robert Welch,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), *Harte-Hanks Communications, Inc. v Connaughton,* 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) and *Masson v New Yorker Magazine, Inc. etal* 111 S.Ct. 2419, 115 L.Ed.2d 447 (1991) to the facts in this situation.

4. Whether defendants violated plaintiff's right to privacy in telecasting court records which defendants knew had been sealed by order of the court fifteen years prior to the telecast, specifically the use of said records in the depiction of plaintiff in a false light.

LIST OF PARTIES TO THE PROCEEDINGS

IN THE COURT BELOW

Werner Rogers, individually and in his official capacity as State School Superintendent;

State of Georgia;

Gillett Communications of Atlanta, Inc. d/b/a WAGA;

James Ryan Shuler.

TABLE OF CONTENTS

Question Presented for Review.....i-ii

List of Parties to the Proceedings in the Court Below.....iii

Table of Contents.....iv-v

Table of Authorities.....vi-ix

Opinions Below.....1

Statement of Jurisdiction.....2

Constitutional Provisions, Treaties, Statutes, Rules and Regulations Involved.....2

Statement of Case.....2-5

Method of Preserving Federal Question.....5-6

Reasons for Granting Writ.....6-10

Conclusion.....10-11

Appendix:

A. Supreme Court of Georgia.....A-1
(Denial of Petition for Certiorari)

B. Judgment Sought to be Reviewed
Order: Georgia Court of Appeals.....B1-23

C. Judgment Reviewed by Georgia Court of Appeals
DeKalb County Superior Court.....C1-14

D. Motion for Reconsideration.....D-1

E. 1974 Order Sealing Records.....E1-2

F. 1975 Order Granting Discharge.....F1-2

G. Statutes

First Offender Statute, effective 1974/75
Ga. L. 1968, p.324.....G1-4

First Offender Statute, currently effective
O.C.G.A. § 42-8-60.....G5-6

O.C.G.A. § 42-8-62.....G7-9

O.C.G.A. § 42-8-63.....G10

O.C.G.A. § 42-8-65.....G11-13

Libel, O.C.G.A. § 51-5-1.....G14

Slander, O.C.G.A. § 51-5-4.....G15

Malice (inference) O.C.G.A. § 51-5-5.....G16

Justification (truth) O.C.G.A. §51-5-6...G17

Privileged Communications
O.C.G.A. § 51-5-7.....G18-19

Defamacast, O.C.G.A. § 51-5-10.....G20-21

Summary Judgment, O.C.G.A. §9-11-56...G22-26

TABLE OF AUTHORITIES

American Broadcasting Co. v Simpson, 106 Ga. App. 231 (126 SE2d 873)(1962).....B-10

Anderson v Liberty Lobby, Inc., 477 U.S. 242 (106 SC 2505, 91 LE2d 202) (1986).....B-15

Barber v Perdue 194 Ga App 287 (390 SE2d 234)(1989).....ii, B-9, B-16

Brewer v Rogers, 211 Ga App 343 (___ SE2d____) (1993).....2, B1-23

Briscoe v Reader's Digest Association, 4 Cal.3d 529, 93 Cal Rpt. 866, 483 P2d 34,(1971).....9

Brown v Capricorn Records, Inc., 136 Ga App 818 (1975).....C-10

Byers v Southeastern Newspaper Corp., 161 Ga App 717 (288 SE2d 698) (1982).....B-13

Cabiness v Hipsley, 114 Ga App 367 (151 SE2d 496) (1966).....B-22, C10-11

Chance v Munford, 178 Ga App 252 (1986).....C-8

Cox Broadcasting Corp. v Cohn, 420 U.S. 469 (95 SC 1029, 43 LE2d 328)(1975).....B-20, C-12

Cox Communications v Lowe, 173 Ga App 812, *cert. denied* 474 U.S. 982 (1985).....C-12

Curtis Publishing Co. v Butts, 388 U.S. 130 (87 SC 1975, 18 LE2d 1094) (1967).....ii, B-18

Eidson v Berry, 202 Ga App 587 (415 SE2d 16) (1992).....B-15

Ellerbee v Mills 262 Ga 516 (422 SE2d 539), (1992).....8, B-13, C-3

Favors v State, 234 Ga 80 (214 SE2d 645) (1975).....B-19

The Florida Star v B.J.F., 491 U.S. 524 (1989)..
.....C-12

Garrison v Louisiana, 379 U.S. 64 (85 SC 209, 13 LE2d 125) (1964).....B-17

Gertz v Robert Welch, Inc., 418 U.S. 323 (94 SC 2997, 41 LE2d 789) (1974).....B-13, C-6

Grayson v Savannah News Press, 110 Ga App 561 (1964).....C-8

Harte-Hanks Comm. v Connaughton, 491 U.S. 657 (109 SC 2678, 105 LE2d 562) (1989)...i, B14, B18

Hightower v General Motors Corp., 255 Ga 349 (338 SE2d 426) (1986).....B-19

Lau's Corp. v Haskins, 261 Ga 491 (405 SE2d 474) (1991).....B-10

Macon Tel. Pub. Co. v Elliott, 165 Ga App 719, 721 (1) (302 SE2d 692) (1983).....B-11

Masson v New Yorker Magazine, Inc., 111 S.Ct. 2419 (115 LE2d 447)(1991).....ii, B9, B12, B15

Milkovich v News Herald 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed2d 1 (1990).....7

Morton v Stewart, 153 Ga App 636 (1980).....C-8

New York Times v Sullivan, 376 U.S. 254 (84 SC 710 11 LE2d 686)(1964).....10; B14,17; C3,6,11

Pacific & Southern Co. v Montgomery, 233 Ga 175 (210 SE2d 714)(1974).....B12, B13

Pavesich v New England Life Ins. Co., 122 Ga 190 (50 SE 68) (1904).....B-21

Perk v Reader's Digest Association, 931 F.2d 408, 18 Media L. rep. 2098 (Sixth Cir.(Ohio) May, 1991).....9

Queen v State, 182 Ga App 794 (357 SE2d 150) (1987).....B-20

Reece v Grissom, 154 Ga App 194 (1980)...C8, C12

Rosenbloom v Metromedia, 403 U.S. 29 (91 SC 1811, 29 LE2d 296) (1971).....B-22

S & W Seafoods Co. v Jacor Broadcasting, 194 Ga App 233 (390 SE2d 228) (1999).....B-10, C-8

Sparks v Thurmond, 171 Ga App 138 (1984)....C-12

St. Amant v Thompson, 390 U.S. 727 (88 SC 1323, 20 LE2d 262) (1968).....B-16, B-17, C-6

Scott v News-Herald 25 Ohio St.3d 243, 254, 496 N.E.2d 699, 709 (1986).....7

Sewell v Eubanks, 181 Ga App 545 (352 SE2d 802)(1987).....B-13

State of Georgia v C.S.B., 250 Ga 261 (297 SE2d 260) (1982).....B-18

Thomason v Times-Journal, Inc., 190 Ga App 601, (379 SE2d 551)(1989).....B-11, B-22, C-8

Tilley v State 197 Ga App 97 (397 SE2d 506) (1990).....B-20

Time, Inc. v Hill, 385 U.S. 374 (87 SC 534, 17 LE2d 456)(1967).....B-22, C-10, C-11

Weldy v Piedmont Airlines 985 F.2d 57 (2nd Cir (N.Y) Jan 28, 1993).....9

White v Hardegree, 190 Ga App 275 (1989).....C-8

Williams v Coffee County Bank, 168 Ga App 149 (1983).....C-12

Williams v Trust Co., 140 Ga App 49 (230 SE2d 45) (1976).....B-13

Williamson v Lucas, 166 Ga App 403 (304 SE2d 412) (1983).....B-15

Witcher v Pender, 260 Ga 248 (392 SE2d 6) (1990).....B-11, B-19

Yarbray v Southern Bell Telephone & Telegraph Co., 261 Ga 703, (409 SE2d 835) (1991).....B-21

STATUTES

O.C.G.A. § 9-11-56.....G22-26; B-10

O.C.G.A. § 42-8-60.....G5-6; B-6
See also: Ga. L. 1968, pg.324.....G1-4

O.C.G.A. § 42-8-62.....G7-9; B-8, B-11, B-20

O.C.G.A. § 42-8-63.....G-10; B-19

O.C.G.A. § 42-8-65.....G11-13; B-18

O.C.G.A. § 51-5-1.....G14; B-10

O.C.G.A. § 51-5-4.....G15; B-10

O.C.G.A. § 51-5-5.....G16; C-9

O.C.G.A. § 51-5-6.....G17; C-8

O.C.G.A. § 51-5-7.....G18-19; C-9

O.C.G.A. § 51-5-10.....G20-21; B-10

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

KEN BREWER,

Petitioner,

vs

WERNER ROGERS, individually,
GILLETT COMMUNICATIONS OF ATLANTA, INC.
D/B/A WAGA AND JAMES RYAN SHULER,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

Ken Brewer, the Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia, entered in the above entitled case on January 28, 1994.

OPINIONS BELOW

The denial of certiorari by the Supreme Court of Georgia whose judgment is herein sought to be reviewed, rendered in Case No. S94CO492, dated January 28, 1994 is reprinted in the separate Appendix to this Petition, pp. A-1.

The opinion of the Court of Appeals of Georgia whose decision the Georgia Supreme Court declined to review is published at *Brewer v Rogers*, 211 Ga App 343 (__SE2d__)(1993), B1-B23.

STATEMENT OF JURISDICTION

The judgment of the Supreme Court of Georgia was entered on January 28, 1994. The jurisdiction of this court is invoked pursuant to U.S.C.A. 28 § 1257(a).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES RULES AND REGULATIONS INVOLVED

U.S. Constitution, 1st and 14th Amendment

OCGA §§9-11-56, 51-5-1,4,10, 42-8-60 *et seq*

Georgia Laws 1968, pg. 324

STATEMENT OF THE CASE

The Petitioner had been a successful high school football coach for ten years when his career was destroyed by a broadcast depicting him as a convicted felon and "trash".

A major television network in Atlanta, Georgia [Defendant Gillett Communications of Atlanta, d/b/a WAGA, a CBS affiliate] was shown interviewing the State School Superintendent

[Defendant Werner Rogers] during an evening broadcast for the admitted purpose of getting the petitioner fired from his job and keeping him from working as a coach. Shuler depo. pg.85, lns 4-10.

The broadcast scanned a picture of a court docket book which showed "adjudicated not guilty" next to the petitioner's name, however the reporter testified that he did not recall whether he saw the word "adjudicated" when asked if he saw the words "adjudicated not guilty" on the docket page. Shuler depo. pg. 57, lns 2-3. The reporter also testified that he "was confused as to what he was seeing on this page -- if there was a guilty plea and if there was a fine and if there were charges and there was the name of the defendant, then why can't I see the file?" Shuler depo. pg. 53, lns 10-14.

The broadcast clearly portrayed petitioner as a convicted felon. pg. B-4.

The reckless disregard "state of mind" standard fails when, as in the instant

situation, a defendant confronted with the evidence he may have known his broadcast was inaccurate, realizes that the less he knows, the better. "We were reporting our story entirely from what was gleaned from public record found in the public courthouse and based on newspaper reports from the time of the incident." Shuler depo., pg. 57, lns 19-24. This being the perfect defense, i.e. no investigation except what is in the defendant's possession, (in this case only two fifteen year old newspaper articles and a sketchy entry in a fifteen year old court docket) which the reporter does not understand.

The defendants misquoted the newspaper articles, calling the petitioner a gambling king-pin, and ignored the court docket book which clearly revealed that the petitioner had been "adjudicated not guilty" of the charges which had been brought against him in 1974.

Sealing petitioner's fate, the State School Superintendent called the petitioner "trash" and said that petitioner was a problem teacher,

although he admitted not knowing anything about the petitioner [or that petitioner was not involved in the grade changing incident]. This is the conclusion made by the State School Superintendent based on the fifteen year old sources shown him by Defendants WAGA and Shuler.

The Superior Court of DeKalb County granted defendants' Motions for Summary Judgment, which the Georgia Court of Appeals upheld. The Court of Appeals denied a Motion for Reconsideration and the Georgia Supreme Court denied Petitioner's Petition for Writ of Certiorari.

METHOD OF PRESERVING FEDERAL QUESTION

Defendants' motions for summary judgment were granted by the Superior Court, the Court finding that Brewer was a public figure and the actual malice standard had not been met. C1-14.

Petitioner appealed to the Georgia Court of Appeals. The Court of Appeals held that a jury could find the contents of the telecast defamatory. B-10. Agreeing that the Petitioner was a public figure, the court granted

defendants' motions for summary judgment holding that petitioner had not established by clear and convincing evidence that defendants entertained serious doubts as to the truth of the matter published. B-17.

Petitioner timely filed his Motion for Reconsideration, which was denied and thereafter filed his Petition for Writ of Certiorari. The Georgia Supreme Court denied the petition.

REASONS FOR GRANTING THE WRIT

The judgement of the Georgia Supreme Court should be reviewed by this court because this case concerns an area of the law which needs further defining. The definition of actual malice or reckless disregard as it applies to slander, libel and invasion of privacy has generally been defined as "what the reporter knew". Against a sophisticated media defendant, proving what a reporter knew is impossible.

The Georgia Court of Appeals held that there was no evidence which would indicate an awareness by either of the defendants of the

probable falsity of the broadcast. B-16

It is impossible to prove that a defendant entertained serious doubts as to the truth of a publication if the reporter had no contact with the person who the story was about, no contact with anyone who knew the person the story was about and did no further investigation beyond looking at two fifteen year old newspaper stories and a court docket book, knowing the file referenced in the docket was sealed and he could not access the file, not understanding what he saw [adjudicated not guilty], knowing the broadcast would ruin the career of the person who the story was about [broadcasting convicted felon/trash], and then getting the facts wrong in the story.

Milkovich was a high school wrestling coach who was not a public figure. *Milkovich v News Herald* 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed2d 1 (1990). In finding that a school superintendent was a public figure, the issue became clouded in a footnote to *Scott v News-Herald* 25 Ohio St.3d

243, 254, 496 N.E.2d 699, 709 (1986) f.5. A high school principal is not a public official in Georgia. *Ellerbee v Mills* 262 Ga 516 (422 SE2d 539) (1992).

A high school teacher and football coach, although usually known and well-liked in the community, does not have much influence over anything outside the sphere of his team and the contests wherein his team competes. The stigma of a felony conviction, broadcast statewide and brought to life fifteen years after an event, will never be forgiven. The boys and parents who respected the coach feel betrayed. No school system in Georgia will ever hire Brewer as they are terrified of another event beyond anyone's control, i.e. a severe athletic injury, a football player's drunk driving conviction, or anything which could call attention to and be blamed on the coach. Unlike politicians, judges, or actors, the high school teacher cannot "run in the next election" or try for another role in a better film.

The most used definition for reckless disregard in defamation and invasion of privacy cases is the "high degree of awareness of ...probable falsity". Consideration of the cumulative circumstantial evidence, including motive as set forth in *Perk v Reader's Digest Association*, 931 F.2d 408, 18 Media L. Rep. 2098 (Sixth Cir.(Ohio) May, 1991), is a more complete definition, but commonly overlooked by courts.

The 2nd Circuit explains the standard of proof which must be applied in particular defamation/privacy cases, and sets forth four possibilities: (1) public person/public matter (2) private person/public matter (3) public person/private matter (4) private person/private matter. *Weldy v Piedmont Airlines* 985 F.2d 57 (2nd Cir (N.Y) Jan 28, 1993). These distinctions could be used in conjunction with the jury issues expressed in *Briscoe v. Reader's Digest Association*, 4 Cal.3d 529, 93 Cal Rpt. 866, 483 P2d 34,(1971) where an eleven year old conviction led to a question of fact as to

whether publication of the old conviction was a violation of the Plaintiff's right to privacy.

A high school coach, uninvolved in a grade change authorized by the school principal, should be permitted to apply a different standard than the actual malice standard set forth in *New York Times v Sullivan* when the person has been completely exonerated of any criminal purpose and a telecast specifically depicts his as an unrehabilitated criminal. See *Briscoe, supra.*

The damages which occur when one receives media attention from a large network have never before been so unsurmountable. The petitioner has been destroyed personally [suffered a heart attack] and professionally, with no recourse. The preference of an "assassin's bullet" can be understood when one loses the respect of society and becomes a leper in his profession and community.

Due to the tremendous power and financial advantages of the defendants, it is not the

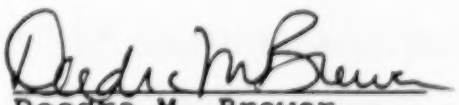
first amendment that will suffer the most if the reckless disregard standard is not defined to accommodate situations as is before this court.

In 1974, Judge Bullard promised Brewer a fresh start if he would hold up his end of the bargain. Brewer did, but the courts have not. See E1-2 and F1-2.

CONCLUSION

Wherefore, Petitioner prays that a Writ of Certiorari issue from this honorable Court to review the judgment of the Supreme Court of Georgia in Case No. S94CO492 dated January 28, 1994. In the event the Petition is granted, Petitioners pray that the judgment of the Court below be reversed and the cause be remanded.

Respectfully Submitted.



Deedra M. Brewer
Attorney for Petitioner
Georgia Bar No. 080230

Brewer & Associates
231 Maxham Rd., Suite 120
Austell, Georgia 30001
(404) 944-6267

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE
ATLANTA

DATE: JANUARY 28, 1994

Case No. S94CO492

KEN BREWER v. WERNER ROGERS, et al.

COURT OF APPEALS CASE NO. A93A1022

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherrie M. Welch, Clerk

December 2, 1993

In the Court of Appeals of Georgia

A93A1022. BREWER v ROGERS, et al.

BEASLEY, Presiding Judge.

Brewer appeals from the grant of summary judgment to state School Superintendent of Schools Rogers, Gillett Communications of Atlanta, Inc. d/b/a/ WAGA-TV 5, and its news reporter Shuler. Brewer sued these parties, plus the State of Georgia, in a number of counts. Relevant to the appeal are claims of libel and defamacast by WAGA and Shuler, slander by Rogers, and false light invasion of privacy by WAGA and Shuler.[1]

The television newscast at issue was aired on November 14, 1989, and was prompted by a then-current investigation of alleged grade changes for a football-playing student at an Athens high school, which WAGA first learned

---

[1] Counts for public disclosure invasion of privacy by WAGA and Shuler and for invasion of privacy by the State acting through Rogers were also included but are not within the scope of Brewer's appeal.

about from a wire service within two weeks prior to WAGA's newscast. Brewer was the head football coach, and the team was known to be one of the best in the state. The news report of the investigation was given by Shuler and, through his interview, Rogers. It featured Brewer as one involved in the affair and named no one else. Shuler related that fifteen years earlier, in 1974, Brewer and three major gambling kingpins had been arrested when Brewer was assistant football coach at Cobb County's Wheeler High School, in a $7,000,000 sports gambling ring which police called "one of the biggest operations in the state," netting $20,000 a month on college and professional sports.

Shuler related that Brewer was charged with commercial gambling, keeping a gambling place, and felony possession of a pound of marijuana, pointing out that Brewer's was the only raided location which yielded drugs. He stated that when Brewer was indicted by the grand jury, he pleaded guilty to the drug charge "and, in a

first offender plea arrangement, plead no contest to the gambling charges." In return, he reported, a judge "sentenced Brewer to one year of probation and a $1,000 fine and sealed the court records."

Shuler then introduced an interview with State School Superintendent Rogers, conducted a few hours earlier, by reporting that Rogers said his office was not aware of Brewer's criminal record until it was revealed by Eyewitness News. He asked Rogers how these things slip by, and Rogers said he didn't know and wished they hadn't, and that if they had known of it, "of an individual being found guilty of a felony," they would have reported it to the PPC[2] for investigation. Shuler then reported that Rogers advised that when some school systems discover a problem teacher, they avoid controversy by "passin' the trash" on to another school.

---

[2] State of Georgia Professional Practices Commission, a public agency. O.C.G.A. § 20-2-790 et seq.

Rogers stated that he thought it unacceptable to have individuals involved in activities "like that," particularly any that involve young people, grade changing, morals charges, or anything like that. The newscast continues with Shuler stating that Rogers said he wanted to know what Brewer put on his application form on the line that asks, "Have you ever been convicted of a felony?" It ends with Shuler stating that Rogers says he will have the state investigate the principals if he catches school systems failing to report "incidents like this one."

Brewer and his wife at the time were arrested on October 21, 1974, for commercial gambling, keeping a gambling place, and violation of the Georgia Controlled Substance Act. The PPC was advised of this shortly thereafter by letter dated October 29 from Cobb's Assistant Superintendent of Schools, which included attachments documenting this. It also advised that Mr. and Mrs. Brewer resigned

on October 22 and their resignations were accepted October 24. The letter shows that a copy was sent to the then State Superintendent of Schools, Nix. In response, the PPC wrote on November 1 that it took jurisdiction. It advised that it would investigate and probably revoke teaching certificates but would wait court adjudication unless it was prolonged, and in that event it would keep the Cobb superintendents informed of its activities.

On the same day, which was eleven days after the arrest, Brewer entered pleas of nolo contendere to two misdemeanor counts of commercial gambling and keeping a gambling place and guilty plea to a felony count of possession of a pound of marijuana. This was on an accusation of the district attorney, Brewer having waived grand jury indictment. He was sentenced to a fine of $250 on each misdemeanor and a fine of $500 on the felony, with one year's probation on the felony and treatment

under the First Offender Act for it. (O.C.G.A. § 42-8-60 et seq.)

About five months later, on May 29, 1975, the court wrote to the PPC as requested and enclosed a copy of the plea and sentence and transcript of the proceedings. The court pointed out in the letter that Brewer had received First Offender treatment and would not have a record if he complied with the court order. The court further advised that all charges against Mrs. Brewer were dismissed. Brewer did not lose his certification.

The transcript sent to the PPC reveals that during the court proceedings, the district attorney stated that with respect to the large gambling operation reported in the newspaper, "Mr. Brewer's case was separate and independent and has no relationship whatsoever legally or factually to the cases which were made against these other persons. Our investigation reveals that this was a rather small-time, if not penny ante, operation here; that no great amount of

bets had been placed, and it was confined to a very small and limited group of individuals, some four or five people, that we have been able to tell." He related that the Illegal Services Division of the police concurred in the recommended disposition, which was subsequently implemented.

In September, upon petition from Brewer and with the consent of the district attorney the court ordered the clerk to seal the record and the "indictment" so that "the same will not be available to the public; however, the Clerk is required to furnish the indictment (sic) and sentence to any court when ordered to do so." The records in the Identification Bureau were likewise ordered sealed.

Three months later, on December 9, 1975, upon the petition of the probation supervisor, the court ordered Brewer "discharged without adjudication of guilt...[which] shall completely exonerate [Brewer] of any criminal purpose..not affect any of [Brewer's] civil rights or

liberties, and [Brewer] shall not be considered to have a criminal conviction." This was in exact conformance with the requirements of O.C.G.A.§ 42-8-62 (a). The court ordered that copies be sent to the State Probation System and the Identification Division of the FBI.

The information about Brewer which was related on the newscast was obtained by Shuler on the day of the newscast from the superior court docket book and two news articles from the Marietta Daily Journal. One, undated in the record, apparently appeared a few days after the arrests on October 21 and was primarily about Brewer, although the arrests of others was also included. He and they were described as bookmakers. The other is dated November 5, four days after the plea and sentencing, and reports the arrest of the three "kingpins" of the large gambling operation the day before the article. It connected Brewer with the gambling ring and reported on Brewer's pleas and sentences, but it did not mention his First Offender treatment.

Shuler testified that the court docket stated that Brewer had been "adjudicated not guilty", and this as well as other portions of the docket sheet flashed across the screen.

Brewer testified that he disclosed the arrest and discharge to his subsequent employers in various school systems, including the last one in Athens. The superintendent of the Clarke County school testified that he disclosed it prior to his employment there.

1. On summary judgment, all evidence and all reasonable inferences which may be drawn therefrom are viewed favorable to the non-movant. *Barber v Perdue* 194 Ga App 287, 189 (390 SE2d 234)(1989). This included "questions of credibility and of the weight to be accorded particular evidence." *Masson v New Yorker Magazine, Inc.*, 501 U.S. (111 S.Ct. 241 9, 115 LE2d 447, 475)(1991). Defendants must demonstrate that there is no genuine issue of material fact as to any essential element of

plaintiff's case. *Lau's Corp. v Haskins*, 261 Ga 491 (405 SE2d 474) (1991) O.C.G.A. § 9-11-56.

2. The count of libel against WAGA and its employee Shuler merge with the count alleging "defamacast" and is constituted of defamation on television. *American Broadcasting Co. v Simpson*, 106 Ga. App. 231 (1) (126 SE2d 873) (1962); O.C.G.A. § 51-5-10 (a). "Defamation by broadcast includes elements of both libel (OCGA § 51-5-1) and slander (OCGA § 51-5-4) *S & W Seafoods Co. v Jacor Broadcasting*, 194 Ga APp 233, 234 (1) (390 SE2d 228) (1989).

a) We cannot say as a matter of law that the statements made were true. As appeared in the public record, if not fully on the docket sheet itself, then in the record of the PPC, Brewer had been discharged without court adjudication of guilt. The law states that "[t]he discharge shall completely exonerate the defendant of any criminal purpose and shall not affect any of his civil rights or liberties; and the defendant shall not be considered to have a

criminal conviction. O.C.G.A. § 42-8-62 (a). As said in *Witcher v Pender,* 260 Ga 248, 249 (392 SE2d 6) (1990), "[t]his provides the person who successfully completes his probation under the first offender statute protection against the stigma of a criminal record."

As described above, there was also public record evidence of PPC knowledge and action and of Brewer's non-involvement in the widespread gambling operation.

A defamatory statement "may be made in indirect terms or by insinuation, [and] the publication thereof must be construed as a whole." *Thomason v Times-Journal, Inc.,* 190 Ga App 601, 602 (1) (379 SE2d 551)(1989). The question is what construction the average viewer would place on the telecast. See *Macon Tel. Pub. Co. v Elliott,* 165 Ga App 719, 721 (1) (302 SE2d 692) (1983). "Except where an alleged [publication] is not defamatory as a matter of law, the general rule is that the issue of

defamation is a matter of fact to be determined by a jury. (Cit.)" Id. at 720.

As in *Pacific & Southern Co. v Montgomery*, 233 Ga 175, 177 & 180 (210 SE2d 714)(1974), "[t]he telecast, the pictures and spoken narrative taken in their entire context, together with the testimony of the plaintiff and the defendant news reporter [and interviewee Rogers, and other evidence in the record], convince us that the issue of defamation or no defamation [is] a question of fact for determination by the jury...in short, whether this telecast was defamatory of the plaintiff on its face, and whether it was true or not pursuant to [the evidence], [are] issues for determination by the jury."

The concept of falsity *vel non* was aired by the United States Supreme Court in *Masson*, supra. Defamation law "overlooks minor inaccuracies and concentrates upon substantial truth...a statement is not considered false unless it 'would have a different effect on the

mind of the [viewer] from that which the plead truth would have produced.' *Masson*, supra 472. the Court concluded that it was a jury question in that case.

b) If there is falsity, the question arises whether Brewer is a public figure. A mixed question of law and fact, it is one for the court and not the jury to determine. *Sewell v Eubanks*, 181 Ga App 545, 546 (1) (352 SE2d 802)(1987); *Williams v Trust Co.*, 140 Ga App 49, 53 (230 SE2d 45) (1976). It is decided on a case by case basis. See *Ellerbee v Mills* 262 Ga 516, 520 (2) (special concurrence) (422 SE2d 539), (1992); see also *Byers v Southeastern Newspaper Corp.*, 161 Ga App 717, 719 (288 SE2d 698) (1982). Compare *Gertz v Robert Welch, Inc.*, 418 U.S. 323 (94 SC 2997, 41 LE2d 789) (1974), which set out that an individual becomes a public figure on one of two alternative basis: "In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all

contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions." Id. at 351.

Based on the record, we conclude that the trial court did not err in finding Brewer to be a public figure, for the purposes of this suit.

c) Because Brewer was a public figure, both at the time of the 1974 episode and also at the time of the 1989 broadcast, actual malice of the truth must be proved. *New York Times v Sullivan*, 376 U.S. 254 (84 SC 710, 11 LE2d 686) (1964). "A public figure may not recover damages for a defamatory falsehood without clear and convincing proof that the false statement was made with "actual malice" -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Harte-Hanks Communications v Connaughton*, 491

U.S. 657, 659 (109 SC 2678, 105 LE2d 562) (1989). See *Williamson v Lucas*, 166 Ga App 403, 404 (2) (304 SE2d 412) (1983); *Eidson v Berry*, 202 Ga App 587, 588 (415 SE2d 16) (1992). A better term than 'actual malice', wrote the United States Supreme Court in *Masson*, supra at 469, is that the publication must be "with knowledge of falsity or reckless disregard as to truth or falsity." On summary judgment in such cases, the question is "whether a genuine issue of actual malice exists -- that is whether the evidence presented is such that a reasonable jury might find that actual malice had been shown with convincing clarity." *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 257 (106 SC 2505, 91 LE2d 202) (1986).

For First Amendment purposes, "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious

doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for the truth or falsity and demonstrates actual malice." *St. Amant v Thompson*, 390 U.S. 727, 731 (88 SC 1323, 20 LE2d 262) (1968). The court considered the competing interests and applied the following rationale: "Neither lies nor false communications served the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. Id. at 732.

Assuming this broadcast communicated falsities or a falsity by Shuler or Rogers or both, there is no evidence which would indicate an awareness by either of them of the probable falsity. Compare *Barber* supra at 290-2891. Brewer's complaint is that they failed to investigate adequately. However, "[f]ailure to

investigate does not in itself establish bad faith." *St. Amant*, supra at 733, citing *New York Times v Sullivan* supra at 287-288. There is no evidence which would establish the required degree of reckless disregard with respect to Rogers, other than his apparent failure to investigate at all before he spoke in the televised interview. Shuler's failure to go beyond the court docket sheet or two 1974 newspaper articles to ascertain the meaning and ramifications of first offender and "adjudicated not guilty", or the actions of the PPC, or the accuracy of the newspaper-alleged tie to a huge gambling operation, or whether Brewer had disclosed the matter to school employers, does not evince actionable reckless disregard. "[T]he defendant must have made the false publications with a 'high degree of awareness of...probable falsity,' *Garrison v Louisiana*, 379 U.S. 64, 74 (1) (85 SC 209, 13 LE2d 125) (1964), or must have 'entertained serious doubts as to the truth of his publication,' *St. Amant, supra* at 731."

Harte-Hanks Communications, supra at 667. What defendants did or did not do here differs from the circumstances in *Curtis Publishing Co. v Butts*, 388 U.S. 130 (87 SC 1975, 18 LE2d 1094) (1967), where the investigatory techniques employed evidenced "an intent to avoid the truth." *Harte-Hanks Communications*, supra at 692-693.

As to the use of the first offender treatment information when there has been a complete discharge, the cases construe the intent of the act to allow only limited use. In *State of Georgia v C.S.B.*, 250 Ga 261 (297 SE2d 260) (1982), for example, the court points out the need for use in a subsequent prosecution of the same defendant. See O.C.G.A. § 42-8-65. The Court also noted the increased confidentiality of first offender records added by the legislature in 1978: access to records of discharge restricted to specified prosecutorial and probation officials upon certification of pending criminal charges (O.C.G.A. § 42-8-65);

and discharge not useable to disqualify one for employment. (O.C.G.A. § 42-8-63). However, the Court held, the Act does not intend complete expungement of the record.

Evidence of the guilty plea underlying the discharged first offender's treatment may not be used to impeach him by showing he has been convicted of a crime involving moral turpitude, *Witcher*, supra, but may be used in a civil trial to impeach an adverse witness by disproving or contradicting his testimony. *Hightower v General Motors Corp.*, 255 Ga 349 (338 SE2d 426) (1986). Since possible lack of trustworthiness is shown by a plea of guilty, even without a formal conviction, the Supreme Court held in *Favors v State*, 234 Ga 80, 87 (3) (214 SE2d 645)(1975), that a defendant in a criminal case could use the first offender guilty plea to impeach the testimony of the witness against him. In reaching this ruling, the Court balanced this right against the rights of the first offender to protection against the stigma of a

criminal record. A prior first offender guilty plea which culminates in a discharge cannot be used later to sentence a defendant as a recidivist. *Queen v State,* 182 Ga App 794 (1) (357 SE2d 150) (1987). First offender disposition and discharge does not preclude, under O.C.G.A. § 42-8-62 (a), "the admission of evidence of the underlying conduct itself for the purpose of showing a similar transaction engaged in by the same person" in a subsequent criminal case. *Tilley v State* 197 Ga App 97,99 (2) (397 SE2d 506) (1990).

Whether defendants were authorized to use the first offender information in the first place for this public broadcast is not an issue pursued by Brewer, and thus we do not decide it. The only claims on appeal are defamation and false light invasion of privacy. We note that in *Cox Broadcasting Corp. v Cohn,* 420 U.S. 469, 492 (95 SC 1029, 43 LE2d 328)(1975), where the Supreme Court applied its view that "[w]ith respect to judicial proceedings in particular,

the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."

3. Brewer claims for false light invasion of privacy by Shuler and WAGA likewise do not survive summary judgment, based on the evidence of record.

"Invasion of privacy was first recognized in this state in the landmark case of *Pavesich v New England Life Ins. Co.*, 122 Ga 190 (50 SE 68) (1904): The right of privacy is embraced within the absolute rights of personal security and personal liberty. Personal security includes the right to exist and the right to the enjoyment of life while existing... Personal liberty includes not only freedom from physical restraint, but also the right 'to be let alone,'..." *Yarbray v Southern Bell Telephone & Telegraph Co.*, 261 Ga 703, 704 (1) (409 SE2d 835) (1991).

Cabiness v Hipsley, 114 Ga App 367, 370 (151 SE2d 496) (19660, divided the tort of invasion of privacy into four types, only one of which is relevant here: "publicity which places the plaintiff in a false light in the public eye."

In a false light case, '"the interest protected is clearly that of reputation, with the same overtones of mental distress as in defamation." Id. at 375 (3). The essential element is that "the false light in which the other was placed would be highly offensive to a reasonable person.' *Thomason v Times-Journal, Inc.*, 190 Ga App 601, 604 (4) (379 SE2d 551) (1989).

We agree with the trial court that the absence of actual malice in the constitutionally-mandated sense precludes recovery under *Cabiness*, supra. It was held in *Time, Inc. v Hill*, 385 U.S. 374 (87 SC 534, 17 LE2d 456)(1967), "that the protections for speech and press include the application of

[state law allowing a privacy action] to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in utter disregard of the truth. Id. at 387-388. See also *Rosenbloom v Metromedia*, 403 U.S. 29, 31 n. 1 (91 SC 1811, 29 LE2d 296) (1971)

Judgment affirmed. Cooper and Smith, JJ., concur.

IN THE SUPERIOR COURT OF DEKALB COUNTY
STATE OF GEORGIA

KEN BREWER,
Plaintiff,

vs.

WERNER ROGERS, Individually and in His Official Capacity, STATE OF GEORGIA, GILLETT COMMUNICATIONS OF ATLANTA, INC., d/b/a WAGA-TV 5 and JAMES RYAN SHULER,
Defendants.

Civil Action
No. 91-9370-8

ORDER AND JUDGMENT

The Motions for Summary Judgment of Defendants Werner Rogers ("Rogers"), Gillett Communications of Atlanta, Inc. d/b/a WAGA-TV5 ("WAGA") and James Ryan Shuler ("Shuler") (collectively, "Defendants") having come on regularly before the court for consideration, and after considering all the materials of record and the arguments of counsel, the Court hereby GRANTS Defendants' Motions for Summary Judgment, and finds as follows:

On November 14, 1989, Defendants WAGA and Shuler broadcast a television news report concerning Plaintiff ("the Broadcast). At the

time of the Broadcast, Plaintiff was the head football coach at Cedar Shoals High School, where state school officials were investigating allegations that the grades of one of the players on Plaintiff's team had been changed to make the player eligible to play football. These allegations and investigation were the subject of media coverage throughout the State of Georgia which named Plaintiff as Cedar Shoals' head football coach.

The Broadcast reported that in 1974 Plaintiff had been arrested on gambling and felony drug charges while he was a coach at Cobb County's Wheeler High School, that Plaintiff entered into a first-offender plea arrangement on those charges and that the Court records had thereafter been sealed. WAGA and Shuler obtained the information about Plaintiff's prior arrest entirely from public docket books at the Cobb County Superior Court and from newspaper articles published at or near the time of Plaintiff's previous arrest. The Broadcast also

contained excerpts of an interview with Defendant Rogers, the State of Georgia's School Superintendent.

Plaintiff filed this suit seeking damages for alleged defamation and invasion of privacy. After the close of discovery, defendants moved for summary judgment on all Plaintiff's claims.

A. PLAINTIFF IS A PUBLIC FIGURE

Defendants contend that Plaintiff is a public figure,[1] and that as such, he cannot recover for either defamation or invasion of privacy unless he can prove that the statements about which he complains were made with "actual malice" under New York Times co. v. Sullivan, 376 U.S. 254 (1964). The Court agrees. There is no genuine issue of material fact that Plaintiff is a public figure for purposes of this defamation and invasion of privacy case.

---

[1]Defendants do not contend that Plaintiff is a public official. Cp. Ellerbee v. Mills, Nos. S92A0595 and S92A0597 (Ga. Nov. 16, 1992).

> "Public figures are defined as those persons who, though not public officials, are involved in issues in which the public had a justified and important interest' and 'include artists, athletes, business people, dilettantes, anyone who is famous or infamous because of who he is or what he had done. [cits.] Consonant with this definition, a college athletic director, a basketball coach, a professional boxer and a professional baseball player, among others have all been held to be 'public figures'. [cits.]

Williams v. Trust Co., 140 Ga. App. 49, 53, 230 S.E.2d 45 (1976). The issue of whether a plaintiff in a defamation or invasion of privacy action is a public figure is an issue for the trial judge to determine in the first instance, not the jury. Williams, 140 Ga. App. at 53, 230 S.E.2d 45.

In this case, it is undisputed that Plaintiff was the head football coach at Clarke County's Cedar Shoals High School, and had been a successful coach in various parts of Georgia for many years. In the season during which the Broadcast was televised, Plaintiff's Cedar Shoals' team had been ranked as high as third or fourth among all AAAA high school football teams

in the state. At the time of the Broadcast, Plaintiff had been named in news wire service reports concerning the grade changing allegations, and those allegations themselves were the subject of a public investigation.

In Plaintiff's separate suit against Times-Journal, Inc. arising from a report by the Marietta Daily Journal similar to the Broadcast in this case, Plaintiff's counsel admitted that my client is a public figure, [and] has been a public figure for years. He's been a football coach. The media is interested in this other issue [whether Brewer's license to teach should be suspended as a result of the Athens grade changing incident]. Brewer v. Times-Journal, Inc., No. 90-1-8483-07, slip op. at 3 (Superior Court of Cobb County, Ga. Nov. 6, 1991) (holding Plaintiff was a public figure, and granting defendants' motion for summary judgment on Plaintiff's invasion of privacy claims).

There are no genuine issue as to any of these facts, the Court holds that Plaintiff is

a public figure who cannot recover for defamation and invasion of privacy in this action unless he can prove "actual malice" under New York Times.

B. PLAINTIFF'S DEFAMATION CLAIMS

Under the New York Times actual malice standard, Plaintiff must prove with convincing clarity that he allegedly defamatory statements were false, and that they were made with actual knowledge that they were false, or with reckless disregard for whether they were false or true. New York Times, 376 U.S. at 279-280, 284. This standard requires Plaintiff to present evidence that the statements were made with a high degree of awareness of probable falsity, and that Defendants in fact entertained serious doubts as to their truth. See Gertz v. Robert Welch, Inc., 418 U.S. 323,332 (1974); St. Amant v. Thompson, 390 U.S.727, 730 - 733 (1967); Williams, 140 Ga. App. at 55. The determination of actual malice under New York Times is a

constitutional issue to be decided by the Court. Williams, 140 Ga. App. at 58.

Defendants offer the deposition testimony of Rogers and Shuler, and the affidavits of Rogers, Shuler and Jack Sander, WAGA's President and General Manager, as evidence that they did not doubt the truth of the statements in the Broadcast. Plaintiff offers no evidence to contradict this testimony, or to establish that Defendants acted with actual malice in making the statements contained in the Broadcast. As a result, the Court finds no genuine issue of material fact as to the issue of actual malice, and holds as a matter of law that Defendants did not act with actual malice in this case.

While it is not necessary to the Court's ruling,the Court finds that here is no genuine issue of material fact that the allegedly defamatory statements concerning Plaintiff contained in the Broadcast were fair and substantially accurate, not false, and were based on information contained in public

records. These statements, therefore, cannot form the basis of liability for defamation. Morton v. Stewart, 153 Ga. App. 636, 641 (1980); Reece v. Grissom, 154 Ga. App. 194, 195 (1980). See Thomason v. Times-Journal, Inc., 190 Ga. App. 601, 602, cert. denied, April 13, 1989); O.C.G.A. § 51-5-6. In addition, the Court finds no genuine issue of material fact that eh allegedly defamatory statements attributed to Defendant Rogers are not defamatory under O.C.G.A. §§ 51-5-1 and 51-5-4 since they are merely generic statements and opinions that do not charge Plaintiff with anything. See S&W Seafood Co. v. Jacor Broadcasting, 194 Ga. App. 233, 235 (1990); White v. Hardegree, 190 Ga. App. 275,277 (1989); Chance v. Munford, Inc., 178 Ga. App. 252, 252-253 (1986); Grayson v. Savannah News-Press, 110 Ga. App. 561, 567-568 (1964). Finally, the Court finds no genuine issue of material fact that the information in the Broadcast concerning Plaintiff's 1974 arrest and plea arrangement was based entirely on

public court records and newspaper articles, reported the contents of those public sources of information fairly and with substantial accuracy,a nd was televised during a public investigation involving the football team of which Plaintiff was the head coach. As a result, the Broadcast was privileged, and cannot for the basis of a claim for defamation. O.C.G.A. §§ 51-5-5, 51-5-7 and 51-5-10(a).

For all the foregoing reasons,the Court grants summary judgment to Defendants on Plaintiff's defamation claims.

C. PLAINTIFF INVASION OF PRIVACY CLAIMS

Plaintiff asserts two separate theories of invasion of privacy in this case: false light, and public disclosure of private facts.

1. False Light Invasion of Privacy

To recover for false light invasion of privacy, Plaintiff must prove (1) that he statements in the Broadcast were false, depicting Plaintiff as something or someone which he is not; and (2) that the statements

were made with actual malice, since the Broadcast dealt with a matter of public interest and since Plaintiff is a public figure. See Brown v. Capricorn Records, Inc., 136 Ga. App. 818, 819 (1975); Cabaniss v. Hipsley, 114 Ga. app. 367, 370 (1966); Time Inc. v. Hill, 385 U.S. 374, 387-88 (1967).

The information about Plaintiff's previous arrest and plea arrangement was a matter of legitimate public interest and concern since (1) Plaintiff was the head football coach at a public high school which was then the target of a public investigation into allegations of improper grade changes involving at least one o f his players; (2) these allegations were highly publicized, and news wire reports named Plaintiff as the school's head football coach; (3) Plaintiff's team had been ranked as high as third or fourth in the state during that football season; (4) the investigation was highly publicized and resulted in Plaintiff's football team forfeiting most of its games and

losing an opportunity to play in the state football playoffs; and (5) Plaintiff was a coach at a public school at the time of his 1974 arrest. As discussed above, Plaintiff is a public figure who cannot prove actual malice as required by New York Times and Hill; and the statements in the Broadcast were substantially true. As a matter of law, therefore, Plaintiff cannot prove the elements of his false light invasion of privacy claim, and the Court grants summary judgment to Defendants on the claim.

2. Public Disclosure of Private Facts

To recover on his claim for invasion of privacy by public disclosure of private facts, Plaintiffs must prove (1) that the alleged disclosure was public; (2) that the facts disclosed were private; secluded or secret; and (3) that the matter made public was offensive and objectionable to a reasonable person of ordinary sensibilities. Cabaniss, 114 Ga at 382.

The broadcast of information obtained from public court documents open to public inspection

cannot form the basis for civil liability under the First and Fourteenth Amendments. The Florida Star v. B.J.F., 491 U.S. 524 (1989); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). Likewise, the broadcast of an individual's arrest record or the fact of his incarceration cannot give rise to any claim for invasion of privacy, especially where such matters have already been widely publicized by the television and print media, since such matters are already public and are matters of public record. Cox Communications v. Lowe, 173 Ga. App. 812, 814, cert. denied, 474 U.S. 982 (1985); Sparks v. Thurmond, 171 Ga. App. 138, 143 (1984); Reece v. Grissom, 154 Ga. App. 194, 196 (1980); Williams v. Coffee County Bank, 168 Ga. App. 149, 150 (1983). Where an incident is a matter of public interest, or is the subject matter of a public investigation, a publication in connection with the incident can be a violation of no one's legal right of privacy. Lowe, 173 Ga. App. 121.

Plaintiff contends that broadcasting the information about his 1974 arrest and plea arrangement violated his right of privacy. The Court disagrees. This information was obtained entirely from public court documents open to public inspection, and from concurrent newspaper articles about his arrest. Also, the Broadcast was made in connection with a public investigation into Plaintiff's football program. As a result, the Broadcast cannot form the basis of civil liability for invasion of Plaintiff's legal right to privacy, and Defendants are therefore entitled to summary judgment on Plaintiff's claim for invasion of privacy by public disclosure of private facts.

THEREFORE, the Court finding no genuine issue of material fact as to any of Plaintiff's claims against Defendants, it is hereby ordered and adjudged that Defendants' Motions for Summary Judgment be GRANTED. There being no just cause for delay, it is further ordered and adjudged that judgment be entered immediately in

favor of Defendants Werner Rogers, Gillett Communications of Atlanta, Inc. and James Ryan Shuler, and against the Plaintiff.

This 4TH day of ~~December~~ Jan, 1993. LWH

S/
LINDA WARREN HUNTER,
Judge
Dekalb County Superior Court

COURT OF APPEALS

OF THE STATE OF GEORGIA

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

A93A1022. BREWER v ROGERS, ET AL

Upon Motion for Reconsideration filed on behalf of the Appellant in the above styled case, it is hereby ordered that pages 3 and 4 of the original opinion in this case attached hereto be substituted for pages 3 and 4 of the original opinion dated December 2, 1993.

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta December 13, 1993

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

s/ Victoria McLaughlin Clerk.

GEORGIA, COBB COUNTY

IN THE SUPERIOR COURT OF SAID COUNTY

IN RE: PETITION OF KEN BREWER

ORDER

The above and foregoing petition having been presented, read, and considered, let the same be filed.

The Honorable Georgia W. Darden having consented to the entry of an order sealing the records and the petition otherwise being supported by affidavits; IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that the Clerk of Cobb Superior Court effectively seal the record and indictment referred to in said petition so that the same will not be available to the public; however, the Clerk is required to furnish the indictment and sentence to any court when ordered to do so. The records in the Identification Bureau are hereby ordered effectively sealed so as to prevent the public from having access thereto unless otherwise

ordered by this court or some other court with competent jurisdiction.

SO ORDERED, this 17th day of September, 1975.

s/ James L. Bullard
James L. Bullard, Judge
Cobb Superior Court
Cobb Judicial Circuit

Minutes 8-I Page 413

Clerk's Office, Superior Court
Cobb County, Georgia
filed in office
This Sept. 18, 1974
s/Tyre Lee Terry, Clerk

IN THE SUPERIOR COURT FOR COBB COUNTY
STATE OF GEORGIA

THE STATE
vs.
KENNETH RAY BREWER
Defendant

Docket no. 6644
County of Cobb
In the Superior Court

ORDER OF DISCHARGE

WHEREAS, the above named defendant, having been placed on probation on the 1 day of November, 1974 for a period of 1 year in accordance with the provisions of the Probation for First Offenders Act (Ga. Laws 1968, p. 324) without an adjudication of guilt, and...

WHEREAS, this Court having been petitioned by the defendant's Probation/Parole Supervisor to discharge said defendant because of his having fulfilled the terms of probation;

WHEREAS, IT IS ORDERED AND DIRECTED THAT in accordance with the provision of the Probation for First Offenders Act (Ga. Laws 1968, p. 324):

A. The defendant be discharged without court adjudication of guilt;

B. That this discharge shall completely exonerate the defendant of any criminal purpose;

C. That this discharge shall not affect any of said defendant's civil rights or liberties; and

D. The defendant shall not be considered to have a criminal conviction.

IT IS FURTHER ORDERED AND DIRECTED that a copy of this Order of Discharge be forwarded to the Office of the State Probation System and a copy forwarded to the Identification Division of the federal Bureau of Investigation.

Ordered this 8th day of December, 1975.

James L. Bullard
Judge
Cobb Superior Court C.J.C.
Court

Recorded 12-9-75

GEORGIA LAWS 1968, p. 324: **CRIMINAL PROCEDURE**

PROBATION FOR FIRST OFFENDERS

No. 729 (House Bill No. 401)

An Act to provide that persons accused of a crime, who have not been previously convicted of a felony, with their consent, be placed on probation after a finding but before an adjudication of guilt; to provide for an adjudication of guilt of such persons upon conviction of another crime; to limit the availability of this Act to a person to one occasion only; to provide for the discharge of a person upon the successful completion of his probation; to provide for the restoration of his civil rights and liberties; to provide that such a person shall not be considered to have a criminal conviction; to provide for forwarding of a record to the State Probation System in the Identification Division of the Federal Bureau of Investigation; to provide that the probationer shall be informed of the terms of this Act when sentence is imposed; to provide for pleading and

proving the finding of guilt as if conviction has been had; to preserve the right to an appeal; to provide an effective date; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. Upon a verdict or plea of guilty or a plea of nolo contendere but before an adjudication of guilt, the court may, in the case of a defendant who has not been previously convicted of a felony, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation as provided by the Statewide Probation Act (Ga.L. 1956, p.270). Upon violation of the terms of probation, or upon a conviction for another crime, the court may enter an adjudication of guilt and proceed as otherwise provided. No person may avail himself of the provisions of this Act on more than one occasion.

Section 2. Upon fulfillment of the terms of probation, or upon release by the court prior to the termination of the period thereof, the defendant shall be discharged without court adjudication of guilt. Such discharge shall completely exonerate the defendant of any criminal purpose, shall not affect any civil right or liberties, and he shall not be considered to have a criminal conviction. Should a person be placed under probation under this Act, a record of the same shall be forwarded to the office of the State Probation System and to the Identification Division of the Federal Bureau of Investigation.

Section 3. The probationer shall be informed of the terms of this Act at the time of imposition of sentence.

Section 4. If otherwise allowable by law in any subsequent prosecution of the defendant for any other offense, such prior finding of guilt may be pleaded and proven as if an adjudication of guilt had been entered and

relief had not been granted pursuant to this Act.

Section 5. A defendant sentenced pursuant to his Act shall have the right to appeal in the same manner and with the same scope and same effect as if judgment of conviction had been entered and appealed from.

Section 6. This Act shall be effective as to all crimes committed after the date of its approval.

Section 7. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved March 18, 1968.

O.C.G.A. § 42-8-60

Probation prior to adjudication of guilt; violation of probation; review of criminal record by judge.

(a) Upon a verdict or plea of guilty or a plea of nolo contendere, but before an adjudication of guilt, in the case of a defendant who has not been previously convicted of a felony, the court may, without entering a judgment of guilt and the consent of the defendant:

(1) Defer further proceeding and place defendant on probation as provided by law; or

(2) Sentence the defendant to a term of confinement as provided by law.

(b) Upon violation by the defendant of the terms of probation, upon a conviction for another crime during the period of probation, or upon the court determining that the defendant is or was not eligible for sentencing under this article, the court may enter an adjudication of guilt and proceed as otherwise provided by law. No person may avail himself of this article on more than one occasion.

(c) The court shall not sentence a defendant under the provisions of this article and, if sentenced under the provisions of this article, shall not discharge the defendant upon the completion of the sentence unless the court has reviewed the defendant's criminal record as such is on file with the Georgia Crime Information Center.

(Ga. L. 1968, p. 324, § 1; Ga. L. 1982, p.1807, § 1; Ga. L. 1985, p. 380, § 1; Ga. L. 1986, p. 218, § 1.)

O.C.G.A. § 42-8-62

Discharge of defendant without adjudication of guilt.

(a) Upon fulfillment of the terms of probation, upon release by the court prior to the termination of the period thereof, or upon release from confinement, the defendant shall be discharged without court adjudication of guilt. The discharge shall completely exonerate the defendant of any criminal purpose and shall not affect any of his civil rights or liberties; and the defendant shall not be considered to have a criminal conviction. It shall be the duty of the clerk of court to enter on the criminal docket and all other records of the court pertaining thereto the following:

"Discharge filed completely exonerates the defendant of any criminal purpose and shall not affect any of his civil rights or liberties; and the defendant shall not be considered to have a criminal conviction. O.C.G.A. 42-8-62."

Such entry shall be written or stamped in red ink, dated, and signed by the person making such entry or, if the docket or record is maintained using computer print-outs, microfilm, or similar means, such entry shall be underscored, bold-face. or made in a similar conspicuous manner and shall be dated and include the name of the person making such entry. The criminal file, docket books, criminal minutes and final record, and all other records of the court relating to the offense of a defendant who has been discharged without court adjudication of guilt pursuant to this subsection shall not be altered as a result of that discharge, except for the entry of discharge thereon required by this sub-section, nor shall the contents thereof be expunged or destroyed as a result of that discharge.

(b) Should a person be placed under probation or in confinement under this article, a record of the same shall be forwarded to the Georgia Crime Information Center. Without

request of the defendant a record of discharge and exoneration, as provided in this Code Section, shall in every case be forwarded to the Georgia Crime Information Center. In every case in which the record of probation or confinement shall have been previously forwarded to the Department of Corrections, to the Georgia Crime Information Center, and to the Identification Division of the Federal Bureau of Investigation and a record of a subsequent discharge and exoneration of the defendant has not been forwarded as provided in this Code Section, upon request of the defendant or his attorney or representative, the record of the same shall be forwarded by the Clerk of Court so as to reflect the discharge and exoneration.

(Ga.L. 1968, p.324, § 2; Ga.L. 1978, p. 1621, § 1; Ga.L. 1982, p. 1807, § 3; Ga.L. 1985, p.283, § 1; Ga.L. 1986, p. 442, § 1; Ga.L. 1990, p.735, § 1.)

O.C.G.A. § 42-8-63

Effect of discharge under article on eligibility for employment or appointment to office.

Except as otherwise provided in this article, a discharge under this article is not a conviction of a crime under the laws of this state and may not be used to disqualify a person in any application for employment or appointment to office in either the public or private sector. (Ga.L. 1978, p.1621, § 2.)

O.C.G.A. § 42-8-65. Use of prior finding of guilt in subsequent prosecutions; release of records of discharge; modification of records to reflect convictions; effect of confinement sentence; effect of confinement sentence where guilt not adjudicated.

(a) If otherwise allowable by law in any subsequent prosecution of the defendant for any other offense, a prior finding of guilt may be pleaded and proven as if an adjudication of guilt had been entered and relief had not been granted pursuant to this article.

(b) The records of the Georgia Crime Information Center shall be modified, without a court order, to show a conviction in lieu of treatment as a first offender under this article whenever the conviction of a person for another crime during the term of probation is reported to the Georgia Crime Information Center. If a report is made showing that such person has been afforded first offender treatment under this article on more than one occasion, the Georgia

Crime Information Center may report information on first offender treatments subsequent to the first such first offender treatment as if they were convictions. Such records may be disseminated by the Georgia Crime Information Center in the same manner and subject to the same restrictions as any other records of convictions.

(c) Notwithstanding any other provision of this article, any person who is sentenced to a term of confinement pursuant to paragraph (2) of subsection (a) of Code Section 42-8-60 shall be deemed to have been convicted of the offense during such term of confinement for all purposes except that records thereof shall be treated as any other records of first offenders under this article and except that such presumption shall not continue after completion of such person's confinement sentence.

Upon completion of the confinement sentence such person shall be treated in the same manner and the procedures to be followed by the court

shall be the same as in the case of a person placed on probation under this article.

(Ga.L. 1968, p. 324, 4; Ga.L. 1978, p. 1621, 3; Ga.L. 1982, p. 1807, 4; Ga.L. 1983, p. 3, 31; Ga.L. 1985, p. 283, 1; Ga.L. 1985, p. 380, 2; Ga.L. 1990, p. 735, 2.)

O.G.C.A. § 51-5-1. **Libel defined; publication prerequisite to recovery.**

(a) A libel is a false and malicious defamation of another, expressed in print, writing, pictures, or signs, tending to injure the reputation of the person and exposing him to public hatred, contempt, or ridicule.

(b) The publication of the libelous matter is essential to recovery.

(Orig. Code 1863, 2916; Code 1868, 2923; Code 1873, 2974; Code 1882, 2974; Civil Code 1895, 3832; Civil Code 1910, 4428; Code 1933, 105-701.)

O.C.G.A. § 51-5-4. Slander defined; when special damage required; when damage inferred.

(a) Slander or oral defamation consists in:

(1) Imputing to another a crime punishable by law;

(2) Charging a person with having some contagious disorder or with being guilty of some debasing act which may exclude him from society;

(3) Making charges against another in reference to his trade, office, or profession, calculated to injure him therein; or

(4) Uttering any disparaging words productive of special damage which flows naturally therefrom.

(b) In the situation described in paragraph (4) of subsection (a) of this Code section, special damage is essential to support an action; in the situations described in paragraphs (1) through (3) of subsection (a) of this Code section, damage is inferred.

(Orig. Code 1863, 2919; Code 1868, 2926; Code 1873, 2977; Code 1882, 2977; Civil Code 1895, 3837; Civil Code 1910, 4433; Code 1933, 105-702.)

O.C.G.A. § 51-5-5. Inference of malice; rebuttal thereof; effect of rebuttal.

In all actions for printed or spoken defamation, malice is inferred from the character of the charge. However, the existence of malice may be rebutted by proof. In all cases, such proof shall be considered in mitigation of damages. In cases of privileged communications, such proof shall bar a recovery.

(Orig. Code 1863, 2917; Code 1868, 2924; Code 1873, 2975; Code 1882, 2975; Civil Code 1895, 3833; Civil Code 1910, 4429; Code 1933, 105-706.)

O.C.G.A. § 51-5-6. **Truth as Justification**

The truth of the charge made may always be proved in justification of an alleged libel or slander.

(Orig. Code 1863, 2921; Code 1868, 2928; Code 1873, 2979; Code 1882, 2979; Civil Code 1895, 3839; Civil Code 1910, 4435; Code 1933, 105-708.)

O.C.G.A. § 51-5-7. **Privileged Communications**

The following communications are deemed privileged:

(1) Statements made in good faith in the performance of a public duty;

(2) Statements made in good faith in the performance of a legal or moral private duty;

(3) Statements made with a good faith intent on the part of the speaker to protect his interest in a matter in which it is concerned;

(4) Fair and honest reports of the proceedings of legislative or judicial bodies;

(5) Fair and honest reports of court proceedings;

(6) Comments of counsel, fairly made, on the circumstances of a case in which he is involved and on the conduct of the parties in connection therewith;

(7) Truthful reports of information received from any arresting officer or police authorities; and

(8) Comments upon the acts of public men in their public capacity and with reference thereto.

(Orig. Code 1863, 2922; Code 1868; 2929; Code 1873, 2980; Code 1882, 2980; Ga. L. 1893, p. 131, 2; Civil Code 1895, 3836, 3840; Civil Code 1910, 4432, 4436; Code 1933, 105-704, 105-709.)

O.C.G.A. § 51-5-10. **Liability for defamatory statements in visual or sound broadcast; damages.**

(a) The owner, licensee, or operator of a visual or sound broadcasting station or network of stations and the agents or employees of any owner, licensee, or operator shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a visual or sound broadcast by one other than the owner, licensee, or operator or an agent or employee thereof, unless it is alleged and proved by the complaining party that the owner, licensee, operator or the agent or employee has failed to exercise due care to prevent the publication or utterance of the statement in the broadcast.

(b) In no event shall any owner, licensee, or operator or the agents or employees of any owner, licensee, or operator of such a station or network of stations be held liable for any damages for any defamatory statement uttered

over the facilities of the station or network by or on behalf of any candidate for public office.

(c) In any action for damages for any defamatory statement published or uttered in or as a part of a visual or sound broadcast, the complaining party shall be allowed only such actual, consequential, or punitive damages as have been alleged and proved.

(Ga. L. 1949, p. 1137, 1-3.)

O.C.G.A. § 9-11-56. **Summary Judgment**

(a) For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon. The motion shall be served at least 30 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law; but nothing in this Code section shall be construed as denying to any party the right to trial by jury where there are substantial issues of fact to be determined. A summary judgment may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damage.

(d) Case not fully adjudicated on motion. If on motion under this Code section judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It

shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in the evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. All affidavits shall be

filed with the court and copies thereof shall be served on the opposing parties. When a motion for summary judgment is made and supported as provided in this Code section, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this Code section, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavits facts essential to justify his opposition, the court may refuse the application for judgment, or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had, or may make such other order as is just.

(g) Affidavits made in bad faith. Should it appear to the satisfaction of the court at any

time that any of the affidavits presented pursuant to this Code section are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party may be adjudged guilty of contempt.

(h) Appeal. An order granting summary judgment on any issue or as to any party shall be subject to review by appeal. An order denying summary judgment shall be subject to review by direct appeal in accordance with subsection (b) of Code Section 5-6-34.

(Ga. L. 1966, p. 609, 56; Ga. L. 1967, p. 226, 25; Ga. L. 1975, p. 757, 3.)

(2)

Supreme Court, U.S.
FILED
JUN 1 1994
OFFICE OF THE CLERK

No. 93-1858

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KEN BREWER,

Petitioner,

v.

WERNER ROGERS, individually,
GILLETT COMMUNICATIONS OF ATLANTA, INC.,
D/B/A WAGA-TV, and
JAMES RYAN SHULER,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL A. KENT, ESQ.
Counsel of Record
JUDSON GRAVES, ESQ.
RICHARD R. HAYS, ESQ.
ALSTON & BIRD
One Atlantic Center
1201 West Peachtree Street
Atlantic, Georgia 30309-3424
(404) 881-7000
Counsel for Respondents
Gillett Communications of
Atlanta, Inc.
d/b/a WAGA-TV and
James Ryan Shuler

10 pp

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

Plaintiff: Ken Brewer

Defendants: Werner Rogers

State of Georgia

Gillett Communications of Atlanta, Inc. d/b/a WAGA-TV[1]

James Ryan Shuler

---

[1] Pursuant to Supreme Court Rule 29.1, the following is a list of all parent companies and subsidiaries of Respondent Gillett Communications of Atlanta, Inc.: New World Communications of Atlanta, Inc. (the new corporate name of Respondent WAGA); New World Communications Group, Inc.; Andrews Group, Inc.; and MacAndrews & Forbes Holdings, Inc.

TABLE OF CONTENTS

	PAGE
PARTIES TO THE PROCEEDINGS IN THE COURT BELOW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	4
REASONS FOR DENYING THE PETITION	4
CONCLUSION	6

TABLE OF AUTHORITIES

Cases

	PAGE
Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) . .	5
Curtis Publishing Co. v. *Butts*, 388 U.S. 130 (1967)	4
New York Times v. *Sullivan*, 376 U.S. 254 (1964)	4, 5
St. Amant v. *Thompson*, 390 U.S. 727 (1968)	4
Time, Inc. v. *Hill*, 385 U.S. 374 (1967)	4

Constitutional provisions

U.S. Const. amend. I	1
U.S. Const. amend. XIV, § 1	1

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a tort action for alleged defamation and invasion of privacy arising from a news report prepared and broadcast by Respondents Gillett Communications of Atlanta, Inc., d/b/a WAGA-TV 5 ("WAGA") and James Ryan Shuler ("Shuler"), its reporter, concerning a public figure's involvement in a matter of legitimate public interest and concern. The report dealt with information learned from public court documents and previously published newspaper articles concerning Petitioner Ken Brewer ("the Broadcast"). [R. 4-15.] Petitioner Brewer was a successful high school football coach at several schools in various parts of Georgia for many years. [R. 5; 291; 322-324; 345-348.] During the season in which the Broadcast was aired, Coach Brewer's Cedar Shoals football team had been ranked as high as third or fourth among all

AAAA schools in Georgia (class AAAA comprises the states' largest high schools). [R. 345-347.] In the days leading up to the Broadcast, Coach Brewer was identified in news wire service reports concerning allegations that members of his football team had their grades changed improperly to make them eligible to play football. These allegations were the subject of a highly publicized investigation by state authorities. [R. 5; 181; 191; 362-363; 571-572; 634-635; 657; 740-746; 763; 792-792; 972-976.] The Broadcast reported that this was not the first time Coach Brewer had been the subject of controversy while coaching in a public high school, and that (1) in 1974, prior to the alleged improprieties at Cedar Shoals, Coach Brewer was arrested on gambling and felony drug charges while he was a coach at Cobb County's Wheeler High School; and (2) Coach Brewer pleaded guilty to the felony drug charge, nolo contendere to the gambling charges, and entered into a first offender plea arrangement. [R. 184-189; 223; 1054-1061; 1068-1070.] It is undisputed that these basic facts are true and were highly publicized at the time of Coach Brewer's previous arrest. [R. 272-273; 280-283; 302; 426-427; 448-449; 509-516; 527-535; 539; 970-971.] The Broadcast was based on information obtained from the public docket books at the Cobb County Superior Court, and from newspaper articles published at the time of Coach Brewer's previous arrest. [R. 182; 759-586; 970-971.]

After the close of discovery, WAGA and Shuler moved for summary judgement on all counts, and filed along with their motion a videotape and transcript of the Broadcast as it was televised.[2] [R. 180-189; 193-196; 223.] WAGA and Shuler submitted evidence showing that they believed at the time of the Broadcast, and believe now, that the Broadcast was true and dealt with a matter of legitimate public interest and concern, and that at neither the time of the Broadcast nor at any relevant time, did WAGA or Shuler bear any type of ill will, hatred or malice toward Brewer, whom they did not know. [R. 182; 191; 300; 441.] Coach Brewer offered no evidence whatsoever to contradict WAGA and Shuler's evidence on these points.

---

[2] The contents of the Broadcast were also summarized in the Court of Appeals' opinion, attached to Brewer's Petition as B-1 through B-23.

Based on the undisputed facts in the record, as opposed to Coach Brewer's continued mischaracterization of them,[3] the trial court granted summary judgement to WAGA and Shuler on all counts. (Appendix to Petition, C1-14.) Coach Brewer appealed the judgment only as to his claims for defamation and false light invasion of privacy. (Appendix to Petition, B1, n.1.) The Court of Appeals affirmed the trial court's grant of summary judgment on both claims, holding that Coach Brewer was a public figure for purposes of his suit, and that actual malice could not be proved since the alleged failure to investigate adequately, without more, is insufficient to show actual malice. (Appendix to Petition, B-1-23.) After the Court of Appeals denied Brewer's motion for reconsideration, the Georgia Supreme Court denied his Petition for Certiorati. (Appendix to Petition, A-1.) Having failed to interest the Georgia Supreme Court in this case, Coach Brewer now asks this Court to review it, despite the fact that three separate courts have all applied the well-settled, constitutional actual malice standard to Coach Brewer, an admitted public figure, to reject all of his claims.

---

[3] Brewer continues in this Court his mischaracterizations of the facts of record which began in the trial court and continued in the Georgia Court of Appeals. Specifically, contrary to Brewer's assertions, his career was not destroyed; the Broadcast did not depict Brewer as a convicted felon, "trash" or an "unrehabilitated" criminal; WAGA and Shuler did not "admit" any purpose to have Brewer fired and keep him from working as a coach as a result of the Broadcast; WAGA and Shuler did not misunderstand the docket entry concerning Brewer at the time of the Broadcast; the Broadcast did not misquote the newspaper articles on which it relied; the Broadcast did not refer to Brewer as a "gambling kingpin"; WAGA and Shuler did not "ignore" the docket entry showing Brewer was "adjudicated not guilty" after serving his sentence under Georgia's first offender statute—a picture of the entry was aired in the Broadcast; Respondent Rogers did not call Brewer "trash" or say that he was a problem teacher; Brewer's heart attack was not caused by the Broadcast, having occurred more than a year and three months after it was aired; WAGA and Shuler did not get their facts wrong in the Broadcast; and WAGA and Shuler did not broadcast any sealed court records concerning Brewer. Brewer's factual assertions to the contrary are simply not supported by the record.

SUMMARY OF THE ARGUMENT

The Petition should be denied because this case raises no special or important reasons to justify Supreme Court review. There is no conflict among the United States courts of appeal or state courts of last resort on the questions presented. The first amendment actual malice standard applied by the courts below has been well-settled for thirty years, and the standard for determining that Coach Brewer is a public figure has been well-settled nearly as long. The decision below applied these standards consistently with this Court's decisions. Accordingly, there are no special or important reasons for granting certiorari in this case.

REASONS FOR DENYING THE PETITION

This case does not warrant review by this Court on certiorari because it involves well-settled applications of equally well-settled principles of first amendment jurisprudence. The actual malice standard which Coach Brewer effectively asks this Court to discard, has been recognized as the law of the land for thirty years, beginning with the landmark case of *New York Times v. Sullivan,* 376 U.S. 254 (1964). The requirement that actual malice requires proof of something more than an allegedly inadequate investigation has been recognized at least since *St. Amant v. Thompson,* 390 U.S. 727, 731-733 (1968). The applicability of the actual malice standard to public figures like Coach Brewer, and to invasion of privacy claims, has been the law at least since *Curtis Publishing Company v. Butts,* 388 U.S. 130, 163-165 (1967) (Warren, J., concurring in the result), and *Time, Inc. v. Hill,* 385 U.S. 374, 387-88 (1967). The questions presented by Coach Brewer, to the extent they can be understood, reflect nothing more than a straight forward application of these well-settled, well-reasoned principles to the facts of his claim. Since no novel questions are presented in this case, the petition should be denied.

The actual malice standard as applied to public figures like Brewer serves important first amendment purposes in insuring

vigorous public discourse on matters of legitimate public interest, such as the quality, integrity and fitness of those charged with coaching high-profile athletic teams in our public schools. As this Court recognized in first adopting the actual malice standard in *New York Times,* the first amendment embodies and protects a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on [public figures]." *New York Times,* 376 U.S. at 270. Thus, any abridgment of these constitutional protections would have far-reaching and dangerous consequences for our democratic society. Not only would thirty years of first amendment jurisprudence concerning public figures be thrown out the window, but numerous other constitutional privileges would also be called into question, including the privilege to report information obtained from official government records. *See Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 491 (1975).

In addition, the issues Coach Brewer attempts to frame do not involve any conflict among the United States courts of appeal or the state courts of last resort. In fact, Brewer does not even attempt to argue that any such conflicts exist. Absent such a conflict, there is no sufficient reason for this Court to review this case on certiorari.

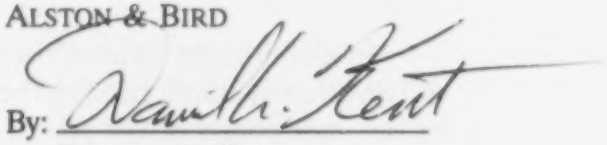
Finally, the three courts below correctly applied the well-settled constitutional standards governing what constitutes a public figure to determine that Brewer is a public figure based on the undisputed facts of this case. The trial court reviewed the undisputed facts in the record to make that determination initially, then the Court of Appeals looked at the record again, reaching the same conclusion. The Georgia Supreme Court saw nothing improper in the Court of Appeals' decision to justify review on certiorari. Thus, all three courts that have considered the issues raised by Brewer agree that the determination that Brewer is a public figure in this case was proper, and that Brewer could not prove actual malice in this case.

This is simply not a case that warrants review by this Court on certiorari. The constitutional principles of actual malice and public figures are well-defined and their applicability well settled. The courts below applied these constitutional principles appropriately. Brewer simply does not like the result these constitutional principles require in this case, and asks the Court to completely abandon thirty years of first amendment jurisprudence to somehow let his claims survive on little more than that basis. This is not the sort of special and important reason for the Court to review a case on certiorari, however, and the petition should therefore be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be Denied.

ALSTON & BIRD

By: 

DANIEL A. KENT
Counsel of Record

JUDSON GRAVES
RICHARD R. HAYS

Attorneys for Respondents
Gillett Communications of
Atlanta, Inc.
d/b/a WAGA-TV and
James Ryan Shuler

One Atlantic Center
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
(404) 881-7000